RIGHTS AND LIABILITIES OF EXECUTORS. — The necessity for some legal means by which the claims of a testator could be collected and his debts paid was met in the Roman law by the fiction that the testator's legal *persona* in which were vested all his rights and obligations, was continued in the heir.[1] In the English law the practice of making sealed instruments run from the obligor and his heirs to the obligee and his heirs, only partially relieved the difficulty. The courts in the early cases finally solved it by regarding the executor as "the attorney of the deceased," [2] and the goods as being "*bona testatoris* and only *in custodia executoris*." [3] The use of the term *executor* and such other terms as *gardiator*, *procurator*, and *dispensator*, seem to suggest a mere power to carry out the wishes of the testator. On this theory the authority of the executor over the personalty might well be regarded as analogous to the power, sometimes possessed by him, to dispose of the realty held by the heir or devisee. In neither case is title in the executor.

Either the fiction that the executor continues the legal *persona* of the deceased, or the conception of the executor as the donee of a power, explains the limitations on his authority. Under the former theory, he is like a corporation *sole* with enumerated powers. His duty is to collect and distribute the estate. Accordingly, he cannot sue for the personal wrongs to the testator, not prejudicial to the estate.[4] Neither can he make contracts,[5] nor continue a partnership of the deceased, even for the benefit of infant children, without incurring personal liability to creditors.[6] The same result is reached on the view that the executor is merely empowered to administer the estate, for he can do no act beyond the scope of his authority.

Without resort to one of these fictions it would seem impossible to explain not only these cases but also the following well-settled propositions. First, one incapable of holding property may be made an executor.[7] Second, on the one hand, property held as executor is not forfeited by sentence of outlawry;[8] and cannot be taken upon execution against the executor as an individual;[9] nor does it pass to his assignee in bankruptcy.[10] On the other hand, the executor's own property is not liable for the debts of the testator.[11] Third, a particular estate, held by the executor as executor, does not merge in the fee acquired by him as an individual.[12] Fourth, chattels bequeathed to an executor, are held by him in his repre-

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[1] See Prof. Langdell in 4 HARV. L. REV. 101; see also Maine, Ancient Law 5th ed. 181.

[2] Gargraffe's Case, 14 H. 6 f. 146 cited in 3 Bulst. 1, 24.

[3] Stanford fol. 188 f. cited in 3 Bulst. 1, 24. Simon de Montfort appointed his wife, not as his executor, but as his attorney. See 2 Poll. & Maitland, Hist. of Eng. Law [2d ed.] 336.

[4] Chamberlain *v.* Williamson, 2 M. & S. 408.

[5] Johnson *v.* Wallis, 112 N. Y. 230.

[6] See Parker *v.* Pratt, 1 T. R. 287; Allsop *v.* Mather, 8 Conn. 554; but see *contra*, Tisch *v.* Rockafellow, 209 Pa. 419. The executor may, however, continue the partnership as a trustee. In that case he would still be liable personally. For the distinction between an executor and a trustee, see Ames, Cas. on Trusts [2d ed.] 73, 74.

[7] See 21 H. 6 f. 7, and cases cited in King *v.* Hanger, 3 Bulst. 1, 24.

[8] Gargraffe's Case, *supra*, and cases cited in King *v.* Hanger, 3 Bulst. 1, 24.

[9] Farr *v.* Newman, 4 T. R. 621.

[10] Note, 3 Burr. 1369. The property does pass to the assignee in bankruptcy if the executor had previously treated the property as his own. Quick *v.* Staines, 1 Bos. & Pul. 293.

[11] Harrison *v.* Beacles, 3 T. R. 688.

[12] Webb *v.* Russell, 3 T. R. 393.

sentative capacity, until election to take as legatee.[13] Fifth, the rights of an executor vest at the death of the testator, so that he may sue for subsequent trespasses committed before his approval by the court. Finally, on a claim against the estate, the executor must be sued as executor.

The doctrine of dual personality was lately applied in New York, where an executor sued both individually and in his representative capacity was permitted to be represented by two counsels. *Roche* v. *O'Connor*, 95 N. Y. App. Div. 496. This fiction is also used by Mr. Justice Holmes to explain the rule which makes residuary legacies general rather than specific.[14] Formerly[15] the executor was entitled to the residue, not "as legatee of those specific chattels, but because he represented the testator, and therefore had all the rights which the testator would have had after distribution." [14] Although the residue, to-day, is usually bequeathed specifically, its character as a general bequest is retained.

RECENT CASES.

AGENCY — LIABILITY OF PRINCIPAL TO THIRD PERSONS IN TORT — RESTRICTION OF CHOICE TO LICENSED CLASS. — In an action against the defendant for the tort of his mine manager, the defendant set up that he was excused from such liability by the provisions of a statute enacting that such managers be hired only from a class licensed by the state. *Held*, that the statute furnishes no defense. *Fulton* v. *Wilmington, etc., Co.*, 37 Chic. Leg. News 75 (U. S. Circ. Ct., N. D. Ill., 1904).

The law of England has long since been settled in accord with this holding. *Martin* v. *Temperley*, 4 Q. B. 98. In the United States the few cases that have been found are in conflict. On one side is the present decision, following a previous tendency of the Illinois state courts. *Cf. Consolidated, etc., Co. of St. Louis* v. *Seniger*, 179 Ill. 370. Squarely opposed is a Pennsylvania decision, holding a state statute, which expressly attempted to impose the liability contended for in the principal case, unconstitutional. *Durkin* v. *Kingston Coal Co.*, 171 Pa. St. 193. The decision of the circuit court seems right. The restriction of the employer's choice to a licensed class modifies no factor which led the common law to impute to the master the tort of his servant. Power of control, not latitude of selection, is the criterion of his obligation. The employer's right to supervise, direct, and discharge for disobedience or incompetency remains unabridged. So should his liability.

BANKRUPTCY — DISCHARGE — INTERPRETATION OF STATUTE. — The amendment of 1903 to the Bankruptcy Act of 1898, in amending § 14 b, provides that "The judge shall . . . discharge the applicant unless he has (5) in voluntary proceedings been granted a discharge in bankruptcy within six years." A bankrupt applied for a discharge in involuntary proceedings. It was objected that, as he had been granted a discharge in voluntary proceedings within six years, he could not, under the clause quoted, be granted a discharge in the present proceedings. *Held*, that the objection must be sustained. *Matter of Neely*, 12 Am. B. Rep. 407 (U. S. Dist. Ct., S. D. N. Y.).

As the other clauses in § 14 b apply to present proceedings, both voluntary and involuntary, the fact that the fifth clause begins with the words "in voluntary proceedings" would naturally indicate an intention that those words also should be construed to apply to present rather than to former proceedings. The court's decision seems doubtful also on principle. The recent tendency in America has been to give debtors a discharge whenever their creditors force them into bankruptcy. 18 U. S. Stat. at Large, part 3, c. 390, p. 180. If the creditor gets the benefit of an equal distribution of the assets, it seems just that the debtor should be freed from the handicap of debt,

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[13] Garrett *v.* Lister, 1 Lev. 25; see also Dyer 277 b.

[14] Holmes, Common Law 344.

[15] The law allowing the executor to take the residue, when not otherwise disposed of, was changed by the St. 11 Geo. 4 and 1 Wm. 4, c. 40.